who has volunteered for induction may be ordered to report for induction without being given an armed forces physical examination." (Emphasis supplied).

Concerning the period of validity of the examination Local Board Memorandum No. 28, in effect during the processing of these petitioners made 120 days the maximum:

"2. Action by Local Board.—(a) Except in the cases of postponed registrants, the 120-day period of validity continues in effect for armed forces physical examinations. However, when a registrant whose physical examination is more than 120 days old is selected for induction, the local board shall not order him to report for armed forces physical examination but shall order him to report for induction. In each such case the registrant will receive a complete examination at the armed forces induction station and when found acceptable will be immediately inducted."

It is evident that both petitioners were deprived of a substantial opportunity for having their religious quarrel with the agency settled in a manner neither the agency nor the petitioners could object to, Taylor not having had an examination for more than five years and Gallegos for more than four years.

II.

Petitioners were denied a physical examination upon their reprocessing by the Selective Service System and this was a denial of due process.

Upon reopening of a classification a registrant is entitled to be reprocessed anew. The regulation is clear and mandatory:

"1625.11 Classification Considered Anew When Reopened. When the local board reopens the regis-

trant's classification, it shall consider the new information which it has received and shall again classify the registrant in the same manner as if he had never before been classified. Such classification shall be *and have the effect of a new and original classification* even though the registrant is again placed in the class that he was in before his classification was reopened." (Italics supplied).

These petitioners' classifications were reopened *three times each* after their physical examinations:

Gallegos:

3/10/54	Classification in Class I-A (By L. Bd.)
3/9/54	Found acceptable (Physical Exam.) [*The only exam. he ever had*]
1/21/55	Reclassification in Class I-O (By A. Bd.)
3/12/58	Reclassification in Class I-A (By L. Bd.)
4/28/58	Reclassification in Class I-O (By A. Bd.)

Taylor:

3/11/52	Classification in Class I-A (By L. Bd.)
2/18/53	Found acceptable (Phys. Exam.) [*The only exam. he ever had*]
8/10/54	Reclassification in Class I-O (By A. Bd.)
3/5/58	Reclassification in Class I-O (By L. Bd.)
5/7/58	Hearing cont. in I-O (By L. Bd.)
6/23/58	Reclassification Class I-O (By A. Bd.)

Each was reclassified *three* times after his physical examination but neither was given a reprocessing that included a physical examination.

This was a gross violation of the regulations and a discrimination.

III.

It was error for the Court of Appeals to conclude that the evaluation of the newly discovered evidence was subject to the trial court's discretion where an unrebutted prima facie showing was made.

Newly discovered evidence must meet five tests, as cited by the Court of Appeals, in its prior decision, *Pitts* v. *United States*, 9 Cir., 1959, 263 F.2d 808, 810. Petitioners' presentation upon their motion patently met these tests. There was nothing for the trial judge's discretion.

CONCLUSION.

The petition should be granted for one or more of the three reasons herein stated.

Respectfully,

J. B. TIETZ,
Counsel for Petitioners.

January 5, 1962.

APPENDIX A.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MANUEL SANCHEZ GALLEGOS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 17,330

DANIEL HOWARD JOHNSON,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 17,331

JOHN FRANKLIN TAYLOR,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 17,332

Nov. 6, 1961

Appeals from the United States District Court
for the Southern District of California,
Central Division.

Before: BARNES and HAMLEY, Circuit Judges; FOLEY, District Judge

PER CURIAM:

Here involved are three appellants, each heretofore convicted of knowingly failing and neglecting to perform

a duty severally required of him under the Universal Military Training and Service Act, 50 App. U. S. Code § 462, to-wit: Johnson refused to obey an order to report to the local board office, and Gallegos and Taylor failed to report for work, after reporting to the local board office. Each conviction was heretofore affirmed by this court, sitting *en banc*. *Johnson* v. *United States*, 1960, 285 F.2d 700. We held that the requirement that a physical examination be given to every registrant within one hundred and twenty days prior to the time he reported for induction into the armed services does not apply to persons ordered to report for civilian work in lieu of military service.

We relied, in part, on *United States* v. *Manns*, 7 Cir., 1956, 232 F.2d 709 at 712[1], and *Miller* v. *United States*, 6 Cir., 1958, 169 F.2d 865, which pointed out the different rule when a registrant is required to report for induction into the armed services, from that when the registrant reports for the noncombatant work of his choice.[2] We rejected ap-

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1. There Judge Swain relied on (a) Operations Bulletin No. 70 of the Selective Service Administration, which was issued on June 19, 1952, which reads: "It is not necessary that Class 1-O registrants be re-examined [physically] in the event they are not ordered to report to work within the 120 days following completion of their first mental and physical examination . . .", however, such a re-examination "may" be ordered; and (b) *United States* v. *Thomas*, E.D. Ill. 1954, 124 F. Supp. 411, affirmed in *United States* v. *Hoepker*, 7 Cir. 1955, 223 F.2d 921, without mention of the point here involved.

2. "Sec. 304 a of the statute under which the regulations were adopted, does not require that there be ninety days between induction and examination, even for the Army. That is left to the Army regulations. Although the statute specifies re-examinations, it does not state at what interval they should be given. That is also left to the regulations. The statute governs only those classified as 1-A, and qualified for military service. It says nothing about those who, though physically fit, are exempted from service because of their beliefs. It follows from the foregoing

pellants' argument, believing the "different stresses" rationale sound. The regulations require only that a physical examination be given to anyone within one hundred and twenty days prior to "induction."

This court, *en banc*, thereafter denied petitions for rehearings in all three cases.

Thereafter each appellant filed in the court below a motion for new trial based solely upon the ground of "newly discovered evidence." (Fed. R. Crim. P. 33.)

A motion for a new trial based upon the ground of newly discovered evidence must meet the following five requirements (*Pitts* v. *United States*, 9 Cir., 1959, 263 F.2d 808, 810):

1. Evidence must be newly discovered after the trial.
2. There must be diligence on part of movant.
3. The evidence must be more than merely cumulative or impeaching.
4. The evidence must be material to the issues involved.
5. The evidence must be such as would probably produce an acquittal.

Appellants rely, as evidence on the existence of an "administrative agency interpretation," dated November 28, 1960, enlarging upon an "administrative agency interpretation" dated September 30, 1960, and itself revoked by an

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that an examination need only be given at some time prior to the order to report for work of national importance . . . ." *Miller* v. *United States*, 6 Cir. 1948, 169 F.2d 865 at 867

"administrative agency interpretation" dated March 10, 1961.[3]

If we concede that an "administrative agency interpretation" is evidence, and not law, we see that such evidence, *first coming into existence in November, 1960,* could not relate to nor control procedures in effect on the dates of the three offenses of failure to report in 1958; might well be deficient under the second and third requirements hereinabove mentioned; and certainly would fail under the fourth and *fifth requirements outlined in Pitts, supra.*

Even were we to assume this "administrative agency interpretation" was "evidence," and "newly discovered" evidence meeting the five requirements listed, the motion would be and was addressed to the sound judicial discretion of the two district court judges, each of whom denied the respective motions before him. The exercise of this discretion, in the absence of abuse, is not reviewable by this court. *Casey* v. *United States*, 9 Cir., 1927, 20 F.2d 752; *Gage* v. *United States*, 9 Cir., 1948, 167 F.2d 122; *Balestreri* v. *United States*, 9 Cir., 1955, 224 F.2d 915; *Pitts* v. *United States*, *supra*.

No abuse of discretion is charged anywhere in appellants' brief. We are asked to again pass upon a question

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3. We need not finally determine if any of these "administrative agency interpretations," (—the first and third being letters from the Director of Selective Service to a state director, and the second written by a subordinate for the Director to a secretary of a conscientious objector's committee—) are properly before us. The fact of the *existence* of the first and second letter was known to the trial courts on the motions for new trial, but neither they nor the third letter were before the lower courts *in haec verba*, nor, in fact, in existence at the time of either trial. *Cf Bowles* v. *United States*, 1943, 319 U.S. 33, for the proposition that an appellate court can take judicial notice of all administrative interpretations.

of substantive law previously decided by us adversely to appellants. This we cannot, and will not, do.

The action of the respective courts below in denying motions for new trial are, and each is, *Affirmed.*

(Endorsed) Per Curiam Opinion Filed Nov. 6, 1961.
Frank H. Schmid, Clerk.

APPENDIX B.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

MANUEL SANCHEZ, GALLEGOS,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.

No. 17331.

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the ..... judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 6, 1961.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

JOHN FRANKLIN TAYLOR,
Appellant,
vs.
UNITED STATES OF AMERICA,
Appellee.
No. 17332

APPEAL from the United States District Court for the Southern District of California, Central Division.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Southern District of California, Central Division, and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 6, 1961.